ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 95 of the	)	
Commission's Rules to Allow	)	RM-8476
Interactive Video and Data Service	)	
licensees to provide mobile service	)	
to subscribers	)	

To: The Commission

SUPPLEMENTAL COMMENTS

Brown and Schwaninger (we) respectfully file these Supplemental Comments. Not until the filing of reply comments was the plan of the majority of the commentors clear. The majority of commentors have made clear that their intention is to provide paging and other messaging services using Interactive Video and Data Service (IVDS) spectrum, regardless of whether they ever have to provide any data service to fixed subscriber locations.

Most reply commentors gave short shrift to our comments. Instead, they attempted to direct the Commission's attention to "the majority" of the comments, and did not deal with the larger, more difficult issues raised by the Commission's proposal. Although the reply commentors dealt in detail with the technical details, such as power levels, they failed to deal with the broader issues of regulatory structure which we raised. Not until the filing of reply comments did it become clear that the intention of some licensees is not to offer IVDS to fixed subscriber locations, but rather, to divert the spectrum totally from its allocated purpose.

The Commission's proposal to permit IVDS licensees to provide some service other than IVDS, disconnected in nature from fixed-location IVDS, brings into collision two paradigms and calls into issue basic questions concerning the Commission's own continued role in the regulation of telecommunications in the public interest. Accordingly, the Commission should consider with great care whether it should adopt the rule amendments which it has proposed.

Congress has given the Commission the duty of regulating the telecommunications industry in the public interest, convenience, and necessity. It has also determined that certain types of authorizations shall be granted by auction. Since it does not appear in either of the bills currently passing through Congress that Congress is inclined to remove from the Commission the task of regulating in the public interest, this proceeding requires the Commission to set the path that it will follow in exercising both responsibilities.

Perhaps the Progress and Freedom Foundation is correct. It would appear that the majority of commentors would favor the Commission's having no function other than to stand before a group of bidders asking, "Next on the block is Lot 234, consisting of one megahertz of spectrum for any use which the buyer desires to make of it. What am I bid?" Under that concept of no responsibility for the public interest, so long as the winning bid is paid, the Commission should have no concern with the use made of the spectrum by the winning bidder.

To date, the Commission has taken a different course, because that is the course assigned to it by Congress. To date, the Commission has continued to carry out its responsibility to see

that the public interest is served by, for example, allocating a certain amount of spectrum for the purpose of providing the public with an Interactive Video and Data Service to and from fixed subscriber locations, a certain amount of spectrum for 900 MHz band SMR systems, a certain amount of spectrum for PCS use, and so forth. The allocation of spectrum to a particular use reflects the Commission's determination that a certain, specified use of the spectrum would be in the public interest, and that a certain quantity of spectrum would be appropriately dedicated to that purpose, rather than to some other purpose.

The majority of the commentors would have the Commission move toward the Progress and Freedom Foundation model, in which the Commission would permit the use of all spectrum for any purpose that the buyer desired to make of it. Were the Commission to proceed down that path, then there would soon be little need for the Commission. However, Congress has not removed from the Commission the important duty of deciding what telecommunications services are in the public interest and of allocating spectrum to those uses.

There is much to be said in support of the concept that all telecommunications services compete with one another. However, that does not imply that all competitors should compete with one another in all fields. As has been said well, the government's role is to protect competition; not competitors. The Commission has determined that the public interest of a certain community would be well served by the allocation of a certain number of television channels. That does not imply that the public interest would be well served by the licensee of a Broadcast Television station's being permitted to decide not to broadcast any television to its

community of license, but, instead, to use the spectrum for some other activity. In allocating spectrum, the Commission's task is to "make available"those services which it believes will be in the public interest, but not necessarily to permit every licensee to offer every service.

Many of the reply commentors make clear that it is their intention that Commission entirely detach paging and other mobile messaging services from interaction with video or from any requirement to provide service to fixed subscriber locations, and permit IVDS licensees to offer only beeper paging, if the licensees so choose. The Commission has permitted broadcasters to offer ancillary paging and messaging services on subcarriers, but only after the broadcasting services to the public had been well established for decades. In the late 1940s, the Commission did not give 200 kHz to FM licensees and 6 MHz to TV licensees and tell them, "please go broadcast something, but since there isn't any current market for FM and TV, maybe do something else if you'd prefer". Because it had determined that there was the provision of a rapid and efficient nationwide FM and TV Broadcasting service was in the public interest, convenience and necessity, the Commission required the broadcasters to do their best to make a market in the field of broadcasting, and nothing else. It is fair to ask if the Commission had not required broadcasters only to broadcast, whether the United States would have a well developed broadcast service today. It is equally open to question whether, if the Commission allows IVDS licensees to divert from making a market for fixed-location IVDS services whether there ever will be an actual IVDS to fixed subscriber locations.

In view of the desire of many of the reply commentors to obtain total absolution from any obligation to provide a data service which involves interaction with video or service to fixed subscriber locations, the Commission's proposed rule amendments would have unsettling and unpredictable effects on bidding in future auctions. One possibility is that bidders for 900 MHz band SMR licenses might bid higher in anticipation of later being freed of any obligation to provide any specific type of service to the public. The contrary possibility is that the number of interested bidders would be reduced because they could not be sure of the nature of what they or others were buying. Adopting the rule amendments which the Commission proposed in the instant proceeding would surely lead other winning bidders in other auctions to demand the opportunity to provide some service other than the one for which spectrum had been allocated and for which an auction had been held. Adopting the instant proposals would appear to serve as precedent for the Commission's taking similar actions after other auctions, but no one could be certain of what would happen. The public interest would be better served by the Commission's deciding not to amend its rules at this time than to destabilize the success that it has had to date in conducting auctions.

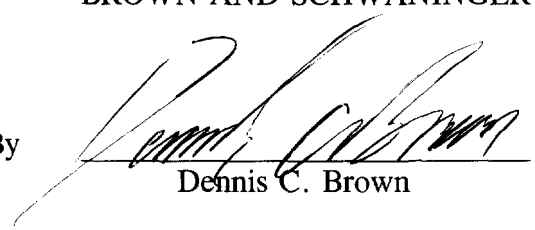
There can be no doubt that what the licensees desire is an implicit guarantee of financial success by allowing successful bidders to thwart, via a spectrum diversion scheme, the public interest analysis upon which the Commission relied in adopting the spectrum allocation that created the IVDS and the subsequent auctions. That the ability to divert from providing any fixed subscriber service, from the outset and perhaps to the exclusion of fixed-location service, is likely to create delays in the bringing forth of the intended IVDS is additionally

worrisome. That licensees support the Commission's proposals prior to their constructing any IVDS system fully demonstrates that the proposals are not directed at providing the type of service proposed by their applications, but rather are intended to override the Commission's decisions in the creation of IVDS. The ultimate conclusion must be that the Commission is being asked to respond to IVDS licensees' buyers' remorse without any concurrent justification which reflects the Commission's original public interest analysis. We respectfully submit that the Commission has already addressed the concerns of the IVDS permittees by grant of extensions in construction deadlines and we support the Commission's previous actions. We cannot, however, support these proposals which seek to severely dilute the Commission's original allocation and which provide no justification that such dilution will serve the public interest, convenience and necessity.

Conclusion

For all the foregoing reasons, we respecfully suggest that the Commission not adopt the rule amendments proposed in the instant proceeding.

Respectfully submitted,
BROWN AND SCHWANINGER

By 
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CERTIFICATE OF SERVICE

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